No. 83-1577

In the Supreme Court of the United States

OCTOBER TERM, 1983

PAUL DEFIORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the federal wire fraud statute, 18 U.S.C. 1343, reaches a scheme to defraud a state and a municipality of their revenue taxes.

2. Whether petitioner was properly indicted and convicted on eight counts of wire fraud emanating from a single scheme to defraud.

3. Whether the evidence was sufficient to support petitioner's conviction.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	3
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Badders v. *United States*, 240 U.S. 391	7
Blockburger v. *United States*, 284 U.S. 299	7
Edwards v. *United States*, 312 U.S. 473	6
Kann v. *United States*, 323 U.S. 88	5
Parr v. *United States*, 363 U.S. 370	4
Pereira v. *United States*, 347 U.S. 1	6
United States v. *Batchelder*, 442 U.S. 114	6
United States v. *Brewer*, 528 F.2d 492	4, 6
United States v. *Brien*, 617 F.2d 299, cert. denied, 446 U.S. 919	5, 6
United States v. *Calvert*, 523 F.2d 895, cert. denied, 424 U.S. 911	7
United States v. *Computer Sciences Corp.*, 689 F.2d 1181, cert. denied, 459 U.S. 1105	4

Page

Cases—Continued:

United States v. *Flaxman*, 495 F.2d 344, cert. denied, 419 U.S. 1031 4

United States v. *Gilliland*, 312 U.S. 86 6

United States v. *Green*, 494 F.2d 820 6

United States v. *Heffington*, 682 F.2d 1075, cert. denied, 459 U.S. 1108 7

United States v. *Henderson*, 386 F. Supp. 1048 ..... 4, 5

United States v. *Mangan*, 575 F.2d 32, cert. denied, 439 U.S. 931 4

United States v. *Maze*, 414 U.S. 395 ..... 6, 8

United States v. *Melvin*, 544 F.2d 767 ..... 4, 6

United States v. *Miller*, 545 F.2d 1204, cert. denied, 430 U.S. 930 5

United States v. *Mirabile*, 503 F.2d 1065, cert. denied, 420 U.S. 973 4

United States v. *Shermetaro*, 625 F.2d 104 4

United States v. *Weatherspoon*, 581 F.2d 595 ..... 4, 6

Statutes:

Jenkins Act, 15 U.S.C. 375 *et seq.* 5

15 U.S.C. 376 5

15 U.S.C. 377 3

Page

Statutes—Continued:

Trafficking in Contraband Cigarettes Act, 18 U.S.C. 2341 *et seq.* 5

18 U.S.C. 2342 3

18 U.S.C. 2342(a) 5

18 U.S.C. 2344 5

18 U.S.C. 1001 6

18 U.S.C. 1341 6

18 U.S.C. 1343 ..... 3, 4, 5, 7, 8

Miscellaneous:

H.R. Rep. 95-1629, 95th Cong., 2d Sess (1978) 6

S. Rep. 1147, 84th Cong., 1st Sess. (1955) 6

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 720 F.2d 757.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1983. A petition for rehearing was denied on January 25, 1984. The petition for a writ of certiorari was filed on March 22, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on ten counts of wire fraud, in violation of 18 U.S.C. 1343. He was sentenced to concurrent terms of three years' imprisonment and fined $1,000 on each count, for a total fine of $10,000. The district court suspended all but six

months of petitioner's sentence of imprisonment and placed him on probation for five years. The court of appeals affirmed (Pet. App. A1-A16).

The evidence at trial, which is summarized in the opinion of the court of appeals (Pet. App. A5-A7), showed that petitioner and two co-defendants, Joseph Coppola and Robert Galler, conspired to defraud the State of New York and New York City of cigarette tax revenues.[1] In 1974, petitioner arranged with John Cox, the president of Piedmont Wholesale Company, to purchase cigarettes from Cox's company in North Carolina. Initially, petitioner took cash, usually about $20,000 per trip, to North Carolina from New York to pay for the cigarettes. In 1975, petitioner asked Cox to open a bank account in New York so that he could avoid having to carry large sums of cash to North Carolina. Cox opened an account in Piedmont's name at First National City Bank in Brooklyn. Petitioner then made weekly deposits to the Piedmont account. Cox, after calling the bank to verify that the weekly deposit had been made, would release petitioner's cigarette order. Ten such telephone calls provided the basis for the counts in the indictment.

Petitioner's orders were packed in plain brown cardboard at Piedmont's warehouse in High Point, North Carolina, and then moved to a barn owned by a Piedmont employee. At the barn, the cigarettes were loaded onto a van or truck and then transported to New York. The truck, which ostensibly appeared to be carrying four-inch diameter pipe, had a removable side panel concealing an interior compartment in which the cigarettes were carried. Upon

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[1]Coppola and Galler were convicted along with petitioner. The court of appeals affirmed their convictions (Pet. App. A1-A16), and this Court denied Coppola's petition for a writ of certiorari on March 26, 1984 (No. 83-5847).

reaching New York, the cigarettes were unloaded at a warehouse in Brooklyn and then distributed in New York without payment of the New York tax of 23¢ per pack. Pet. App. A5-A7.

On appeal, petitioner claimed, inter alia, that the federal wire fraud statute was improperly applied to a scheme to defraud a state or city of its taxes, and that he should have been indicted instead under 15 U.S.C. 377 or 18 U.S.C. 2342, which specifically regulate the interstate selling of cigarettes. The court of appeals rejected this claim (Pet. App. A7-A8 & n.2). Petitioner also argued that the evidence was insufficient to support his conviction. The court of appeals agreed with petitioner that the evidence was insufficient to support his conviction on Counts 5 and 8 and reversed petitioner's conviction on those counts (*id.* at A8-A10).[2] A majority of the panel found the evidence sufficient on the remaining eight counts and affirmed petitioner's conviction on these counts (*ibid.*).

Judge Winter dissented. Believing that the government's proof would have been sufficient to prove one count of wire fraud had the indictment charged only one count (Pet. App. A14), Judge Winter stated that "Congress surely did not intend that the exposure to criminal liability should be so dependent upon the number of phone calls * * * made" (*id.* at A15).

ARGUMENT

1. Petitioner claims (Pet. 6-12) that the federal wire fraud statute, 18 U.S.C. 1343, does not reach schemes to violate state or municipal laws. The contrary decision of the court

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[2]Collect telephones calls from a telephone number in Garden City, New York, to the Piedmont Company in North Carolina provided the basis for Counts 5 and 8. The court of appeals held that the government had failed to prove a nexus between these calls and the scheme to defraud (Pet. App. A10).

of appeals, however, is correct and does not conflict with any decision of this Court or any other court of appeals. Indeed, as the court below noted (Pet. App. A7), four other circuits have "squarely applied the federal fraud statutes to state tax law violations." See *United States* v. *Melvin*, 544 F.2d 767 (5th Cir. 1977); *United States* v. *Brewer*, 528 F.2d 492 (4th Cir. 1975); *United States* v. *Mirabile*, 503 F.2d 1065 (8th Cir. 1974), cert. denied, 420 U.S. 973 (1975); *United States* v. *Flaxman*, 495 F.2d 344 (7th Cir.), cert. denied, 419 U.S. 1031 (1974).

Section 1343 contains no restrictive language excluding any type of fraud. The statute on its face applies to any scheme in which the wires are used for the purpose of executing the scheme. As the court below wrote (Pet. App. A8 (footnote omitted)), "Congress clearly has the authority to regulate such misuse." See *Parr* v. *United States*, 363 U.S. 370, 389 (1960), in which this Court stated that "[t]he fact a scheme may violate state laws does not exclude it from the proscriptions of the federal mail fraud statute, for Congress 'may forbid any . . . [mailings] . . . in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not.' *Badders* v. *United States*, 240 U.S. 391, 393."

Petitioner relies (Pet. 8-9) on *United States* v. *Henderson*, 386 F. Supp. 1048 (S.D.N.Y. 1974), in which the district court held that the mail fraud statute was not intended to reach federal income tax evasion. But several circuits, including the Second Circuit, have questioned the decision in *Henderson*, and the Ninth Circuit has flatly rejected it. See *United States* v. *Computer Sciences Corp.*, 689 F.2d 1181, 1187-1188 n.13 (4th Cir. 1982), cert. denied, 459 U.S. 1105 (1983); *United States* v. *Shermetaro*, 625 F.2d 104, 111 (6th Cir. 1980); *United States* v. *Weatherspoon*, 581 F.2d 595, 599 n.1 (7th Cir. 1978); *United States* v. *Mangan*, 575 F.2d 32, 49 (2d Cir.), cert. denied, 439 U.S. 931 (1978);

United States v. *Miller*, 545 F.2d 1204, 1216 n.17 (9th Cir. 1976), cert. denied, 430 U.S. 930 (1977). It does not appear that any court has followed *Henderson*.[3]

Nor is there any merit to petitioner's related claim (Pet. 7-8) that he could be prosecuted only under the Jenkins Act, 15 U.S.C. 375 *et seq.*, or under the Trafficking in Contraband Cigarettes Act, 18 U.S.C. 2342(a). Both statutes govern the interstate sale of cigarettes and contain criminal penalties for failure to comply with their provisions.[4] Unless Congress clearly and unequivocally intended a contrary result, multiple statutes proscribing the same conduct must be read to co-exist harmoniously. See, *e.g.*, *United States* v. *Brien*, 617 F.2d 299, 310 (1st Cir.), cert. denied, 446 U.S. 919 (1980). As the court of appeals noted (Pet. App. A8 n.2), nothing in the language or legislative history of either statute indicates that Congress intended these laws to be exclusive vehicles for the prosecution of state cigarette tax

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[3]Petitioner's reliance (Pet. 10) on this Court's decision in *Kann* v. *United States*, 323 U.S. 88 (1944), is also misplaced. In *Kann*, this Court simply held that the mailings in that case were not for the purpose of executing the fraudulent scheme because the scheme had reached fruition before the mailings occurred. In the instant case, by contrast, Cox never shipped petitioner's cigarette orders before he had verified by telephone that petitioner had deposited the necessary payment to Piedmont's bank account. See also page 8 note 6, *infra*.

[4]The Jenkins Act, 15 U.S.C. 376, requires the seller of cigarettes in interstate commerce to register with the tax officials of states into which the cigarettes are shipped and to furnish copies of invoices disclosing the purchasers' names and addresses.

The Trafficking in Contraband Cigarettes Act, 18 U.S.C. 2341 *et seq.*, proscribes the possession, selling, receiving, or purchasing of contraband cigarettes, which are defined as more than 60,000 cigarettes that do not bear evidence that the applicable state cigarette tax has been paid. While this Act may apply to petitioner's conduct, penalties for violating the act are harsher than penalties under the wire fraud statute. Both statutes provide for terms of imprisonment of not more than five years, but under the Trafficking Act the offender may be fined as much as $100,000 for each offense (18 U.S.C. 2344), while Section 1343 provides for a maximum fine of $1,000 for each offense.

evasion cases. See S. Rep. 1147, 84th Cong., 1st Sess. (1955); H.R. Rep. 95-1629, 95th Cong., 2d Sess. 4 (1978). Moreover, the gravamen of petitioner's offense involves more than illicit transportation of untaxed cigarettes; he could be prosecuted for the current offenses only because he utilized interstate communication facilities to execute his fraudulent scheme.

This Court has recognized that "when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants." *United States* v. *Batchelder*, 442 U.S. 114, 123-124 (1979). See also *United States* v. *Maze*, 414 U.S. 395, 406 (1974) (Burger, C.J., dissenting) ("The mail fraud statute continues to remain an important tool in prosecuting frauds in those areas where legislation has been passed more directly addressing the fraudulent conduct."). Thus, the mail fraud statute has been used often to prosecute persons whose conduct violated other federal laws. See, *e.g.*, *Pereira* v. *United States*, 347 U.S. 1 (1954) (National Stolen Property Act); *Edwards* v. *United States*, 312 U.S. 473 (1941) (Securities Act); *United States* v. *Brien*, *supra* (Commodities Futures Trading Act); *United States* v. *Weatherspoon*, *supra* (false statements to a government agency (18 U.S.C. 1001)); *United States* v. *Green*, 494 F.2d 820 (5th Cir. 1974) (Truth in Lending Act). Moreover, in cases directly analogous to the instant case, two courts of appeals have rejected the contention that the Jenkins Act preempts prosecutions for evasion of state cigarette tax laws under the federal mail fraud statute, 18 U.S.C. 1341. *United States* v. *Melvin*, 544 F.2d at 773-777; *United States* v. *Brewer*, 528 F.2d at 497-498.[5]

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[5]Contrary to petitioner's suggestion (Pet. 11), prosecution under the wire fraud statute is not barred because its maximum penalty is greater than that proscribed by the Jenkins Act. *United States* v. *Brewer*, 528 F.2d at 498. Cf. *United States* v. *Gilliland*, 312 U.S. 86, 95 (1941).

2. Petitioner also argues (Pet. 10-12) that he was improperly convicted on multiple counts of wire fraud when his conduct in fact constituted a single offense. This contention lacks merit. As the evidence at trial demonstrated (Tr. 542-546), each telephone call that formed the basis for petitioner's wire fraud convictions corresponded to a separate sale and shipment of cigarettes from Piedmont to petitioner. Even though the purchaser and buyer were the same individuals in each sale, each sale constituted a separate offense. *Blockburger* v. *United States*, 284 U.S. 299, 301-303 (1932). And even if petitioner had been indicted under the Jenkins Act or the Trafficking Act, he could have been convicted on multiple counts of violating those acts—one count corresponding to each illegal sale and shipment of cigarettes.

Equally incorrect is the dissent's reasoning (Pet. App. A15) that, because petitioner was involved in only a single scheme to defraud, he was improperly convicted on multiple counts of wire fraud. It is now clearly settled that each separate use of the wires constitutes an offense under Section 1343 even if they were all in furtherance of a single, overarching fraudulent scheme. See, *e.g.*, *United States* v. *Heffington*, 682 F.2d 1075, 1081 (5th Cir. 1982), cert. denied, 459 U.S. 1108 (1983); *United States* v. *Calvert*, 523 F.2d 895, 903 n.6 (8th Cir. 1975), cert. denied, 424 U.S. 911 (1976). See also *Badders* v. *United States*, 240 U.S. 391, 394 (1916).

3. Petitioner claims (Pet. 13-14) that the evidence was insufficient to support his conviction because the government failed to prove "the content" of the telephone calls on which his convictions rest. This argument is wholly without merit. Cox testified that he telephoned the First National City Bank to confirm that petitioner had deposited funds in Piedmont's account to pay for the cigarettes before Cox released any of petitioner's orders (Tr. 93, 297). Piedmont's

telephone toll records and bank records reflected that the calls to the bank coincided with the dates when large cash deposits were made in Piedmont's bank account (Tr. 542-546). Bank employees identifiec' petitioner as the individual who made weekly cash deposits of $15,000 to $40,000 into the Piedmont account (Tr. 323-325, 502-503). This evidence, as the court below stated (Pet. App. A10), "leads to the inescapable inference that Cox telephoned Brooklyn on the eight occasions listed in the indictment in order to verify [petitioner's] deposits to Piedmont's account." Further review of this fact-bound claim is not warranted.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6]Relying on this Court's decision in *United States* v. *Maze*, 414 U.S. 395 (1974), petitioner argues (Pet. 12) that the telephone calls between Cox and the New York bank were not for the purpose of executing the scheme to avoid paying New York cigarette taxes. Unlike the situation in *Maze*, the calls in question here were central to the success of the fraud scheme. In *Maze*, the mailings occurred after the fraudulent scheme was completed (414 U.S. at 402). In the instant case, however, Cox testified that he did not release petitioner's cigarette orders until he had called the bank and confirmed that petitioner had paid for the orders by depositing funds in Piedmont's account (Tr. 93, 297). This use of the telephone wires was essential to petitioner's fraudulent conduct, and thus Cox's calls were made for the purpose of executing the scheme within the meaning of Section 1343.

DOJ-1984-05